

No. 13560

United States
Court of Appeals
For the Ninth Circuit.

This is only

FONG HUNG,

Appellant,

vs.

BRUCE G. BARBER, as the District Director of
the Immigration and Naturalization Service,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

DEC - 3 1952

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,
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United States Attorney,
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Attorneys for Appellee.

In the United States District Court in and for the
Northern District of California, Southern
Division

Habeas Corpus No. 31512

In the Matter of the Application of
FONG HUNG, for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Joseph S. Hertogs on behalf of
Fong Hung respectfully shows:

I.

That the said Fong Hung, the person in whose
behalf this writ is applied for, is now detained and
restrained of his liberty by the respondent, Bruce
G. Barber, District Director, Immigration and
Naturalization Service, San Francisco District, and
his officers and agents; that the said Fong Hung
is now confined in the Detention Facilities of the
Immigration and Naturalization Service at 630
Sansome Street, City and County of San Francisco,
State of California;

II.

That no one has filed, in behalf of the said Fong
Hung, a previous application for a writ of Habeas
Corpus in and about the matter set forth herein
to any Court;

III.

That the petitioner has been advised by the San
Francisco Office of the Immigration and Naturali-

zation Service that the said Fong Hung is to be deported from the United States on May 4, 1952, and that such deportation would take effect unless this Court intervened to prevent deportation at this time;

IV.

That the said Fong Hung arrived at the Port of San Francisco, State of California, ex SS "President Wilson" on February 23, 1951; that the said Fong Hung has been detained and restrained of his liberty by the respondent in the Detention Facilities of the Immigration and Naturalization Service at all times since February 23, 1951;

V.

That subsequent to his arrival, the said Fong Hung was detained for further examination before a Board of Special Inquiry; that on a date unknown to said petitioner, the Board of Special Inquiry voted to exclude the said Fong Hung from admission to the United States; that the excluding decision of the Board of Special Inquiry has been affirmed on appeal by both the Acting Assistant Commissioner of Immigration and Naturalization and by the Board of Immigration Appeals;

VI.

That the decision of the Board of Special Inquiry which was modified and affirmed by the Assistant Commissioner of the Immigration and Naturalization Service and by the Board of Immigration Appeals is illegal and improper, and such

illegality consists in the following, among other things:

That Section 23 of the Internal Security Act of 1950, (8 U.S.C.A. 156), which amended Section 20 of the Immigration Act of February 5, 1917, specifically provides that the administrative authority must make findings that aliens would not be subject to physical persecution if deported; that the necessity of such finding as required by the statute is basic and jurisdictional; that failure to make such a finding as required by the statute is a fundamental defect which affects the validity of the present order;

That your petitioner does not have a copy of the Board of Special Inquiry hearing or the subsequent orders of the Assistant Commissioner of the Immigration and Naturalization Service and the Board of Immigration Appeals, and therefore copies of such records are not annexed hereto;

VII.

That the said Fong Hung was inducted into the armed forces of the United States at San Francisco, California on August 26, 1942; that the said Fong Hung was honorably discharged from the armed forces of the United States at Tampa, Florida on April 10, 1943; that the said Fong Hung has filed with the respondent herein, Bruce G. Barber, District Director, an application to file a petition for naturalization as a person who served honorably in the armed forces of the United States during World War II; that such application was filed

pursuant to the provisions of Section 324A of the Nationality Act of 1940 (8 U.S.C.A. 724A); that the said Fong Hung's application to file a petition for naturalization has not been considered by the Immigration and Naturalization Service or by this Honorable Court; that it is the contention of the said Fong Hung that he is entitled to a hearing on his application for naturalization;

VIII.

That the said Bruce G. Barber and his officers and agents aforesaid threatened to transport the body of the said Fong Hung beyond the jurisdiction of this Court to a foreign country, namely China; that China is now engaged in a civil war that would endanger the life of the said Fong Hung; that the said Fong Hung, as an honorably discharged veteran of the armed forces of the United States, would suffer physical persecution if handed over to the Communists in China; and that to deport the said Fong Hung to China would be unusual and inhumane punishment contrary to the laws of the United States;

Wherefore, your petitioner prays that a writ of Habeas Corpus issue releasing the said Fong Hung from the detention and custody of the respondent, Bruce G. Barber as District Director of the Immigration and Naturalization Service, San Francisco District, City and County of San Francisco, State of California.

/s/ JOSEPH S. HERTOGS.

State of California,
City and County of San Francisco—ss.

Joseph S. Hertogs, being first duly sworn, on behalf of Fong Hung, the subject of the foregoing petition, says:

That he has read the foregoing petition, and knows the contents thereof, and that the facts therein alleged are within his knowledge and that the same is true, except as to the matters therein stated upon information or belief, and as to those matters that he believes it to be true; that affiant is attorney for the said Fong Hung, and that the said Fong Hung cannot read English proficiently and is detained in the custody of respondent and, therefore, is unable to verify said petition, and that affiant, therefore, makes this affidavit.

/s/ JOSEPH S. HERTOGS.

Subscribed and sworn to before me this 1st day of May, 1952.

[Seal] /s/ L. RUTH WILBUR,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed May 1, 1952.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

The United States of America.

To: Bruce G. Barber, District Director, Immigration and Naturalization Service, United States Department of Justice, 630 Sansome Street, San Francisco, California.

The petition of Joseph S. Hertogs in behalf of Fong Hung having been duly filed herein, praying that a writ of habeas corpus issue in the above-entitled matter,

It Is Hereby Ordered that you, Bruce G. Barber, District Director of the Immigration and Naturalization Service, 630 Sansome Street, City and County of San Francisco, State of California, be and appear before the undersigned Judge of the above-entitled Court on Tuesday the 20th day of May, 1952, at the hour of 10 o'clock a.m., to show cause, if any you have, why such writ should not be issued.

And the United States Marshal in and for the Northern District of California, at San Francisco, is hereby ordered and directed forthwith to serve a copy of this Order upon the said Bruce G. Barber, together with a copy of the Petition aforesaid.

Dated: San Francisco, California, this 1st day of May, 1952.

/s/ LOUIS E. GOODMAN,

Judge of the District Court.

[Endorsed]: Filed May 1, 1952.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now, Bruce G. Barber, District Director, United States Immigration and Naturalization Service of San Francisco, California, hereinafter referred to as respondent, to show cause why writ of habeas corpus should not be issued, admits, denies and alleges as follows:

I.

Respondent admits the allegations contained in paragraph I of the petition for writ of habeas corpus.

II.

Respondent admits the allegations contained in paragraph II of the petition for writ of habeas corpus.

III.

Respondent admits the allegations contained in paragraph III of the petition for writ of habeas corpus, except that upon the filing of said petition, the petitioner's deportation was temporarily stayed.

IV.

Respondent admits the allegations contained in Paragraph IV of the petition for writ of habeas corpus.

V.

Respondent admits the allegations contained in Paragraph V of the petition for writ of habeas corpus, and in support thereof the certified record

of the Immigration and Naturalization Service, marked Exhibit "A," is attached hereto and made a part of the Return to Order to Show Cause.

VI.

Respondent denies the allegations contained in Paragraph VI of the petition for writ of habeas corpus. A copy of the Board of Special Inquiry Hearing, the Order of the Assistant Commissioner of Immigration and Naturalization Service, and the Order of the Board of Immigration Appeals are contained in respondent's Exhibit "A."

VII.

Respondent admits the allegations contained in Paragraph VII of the petition for writ of habeas corpus, but specifically denies that the petitioner is entitled to a hearing on his application for naturalization.

VIII.

Respondent admits that it is his intention to deport Fong Hung to a foreign country, but denies that such foreign country is China. Respondent affirmatively asserts that it is his intention to deport Fong Hung to the British Crown Colony of Hong Kong, the country from which the petitioner came and in which petitioner's family now resides. Respondent further denies that there is any intention to hand the petitioner over to the Communists in China.

TRUE CAUSE OF DETENTION

Petitioner arrived at the Port of San Francisco, State of California, on February 23, 1951. Petitioner was accorded a hearing before a Board of Special Inquiry, in accordance with 8 U.S.C.A. 153, and the regulations made thereunder. The Board of Special Inquiry found the petitioner inadmissible to the United States on the following grounds:

“1. He is an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder;

“2. He does not present an unexpired passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance or other travel document showing his origin and identity;

“3. He admits having committed a felony or other crime or misdemeanor involving moral turpitude, to wit: perjury.”

The decision of the Board of Special Inquiry was affirmed by the Commissioner of Immigration and Naturalization. Thereafter, the petitioner appealed to the Board of Immigration Appeals, and on September 25, 1951, the Board of Immigration Appeals dismissed petitioner's appeal from the Commissioner's decision. The petitioner then obtained the services of Attorney Boyd H. Reynolds, who filed with the Board of Immigration Appeals, on petitioner's behalf, a motion to reopen the Board hearing.

The Board of Immigration Appeals denied the motion under date of January 30, 1952. The petitioner, through counsel, then contacted two members of Congress in an effort to obtain a private bill. After being advised as to the facts set forth in the Immigration records, the congressmen denied the request.

Under the provisions of 8 U.S.C.A. 154 (Section 18 Immigration Act of 1917) arrangements were made to deport the petitioner to the British Crown Colony of Hong Kong. Upon the filing of the present petition for writ of habeas corpus, the intended deportation was temporarily stayed.

Wherefore, respondent prays that the order to show cause be discharged.

Dated: May 13, 1952.

/s/ BRUCE G. BARBER,
District Director.

[Endorsed]: Filed May 14, 1952.

[Title of District Court and Cause.]

TRAVERSE TO THE RETURN TO ORDER
TO SHOW CAUSE

Comes Now the petitioner, by his attorney, Joseph S. Hertogs, and makes this Traverse to the return to order to show cause, and states as follows:

I.

With reference to paragraph 6 of said return, petitioner alleges that the decision of the Board of

Special Inquiry and the order of the Assistant Commissioner of the Immigration and Naturalization Service and the order of the Board of Immigration Appeals, which are marked as respondent's exhibit "A" are illegal and improper, inasmuch as they do not comply with the Immigration statutes which require that the administrative authority make a specific finding concerning physical persecution.

II.

In answer to paragraph 7 of said return, petitioner alleges that as an honorably discharged member of the armed forces of the United States who served during World War II he is entitled to a hearing on his application for naturalization.

III.

With reference to paragraph 8 of said return, petitioner affirmatively asserts that it is the intention of the respondent to deport the petitioner to Communist China.

Wherefore, your petitioner prays that a writ of Habeas Corpus issue releasing the said Fong Hung from the detention and custody of the respondent, Bruce G. Barber as District Director of the Immigration and Naturalization Service, San Francisco District, City and County of San Francisco, State of California.

/s/ JOSEPH S. HERTOGS.

State of California,

City and County of San Francisco—ss.

Joseph S. Hertogs, being first duly sworn, on behalf of Fong Hung, the subject of the foregoing, says:

That he has read the foregoing Traverse, and knows the contents thereof, and that the facts therein alleged are within his knowledge and that the same is true, except as to the matters therein stated upon information or belief, and as to those matters that he believes it to be true; that affiant is attorney for the said Fong Hung, and that the said Fong Hung cannot read English proficiently and is detained in the custody of respondent and, therefore, is unable to verify said Traverse, and that affiant, therefore, makes this affidavit.

/s/ JOSEPH S. HERTOGS.

Subscribed and sworn to before me this 20th day of May, 1952.

[Seal] /s/ L. RUTH WILBUR,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed May 20, 1952.

In the United States District Court, for the
Northern District of California, Southern
Division

No. 31512

FONG HUNG,

Petitioner,

vs.

BRUCE G. BARBER, as District Director of the
Immigration and Naturalization Service, for
the Northern District of California,

Respondent.

ORDER DENYING PETITION FOR WRIT OF
HABEAS CORPUS

On May 1, 1952, the petition for writ of habeas corpus was filed herein. Order to show cause why the petition should not be granted was issued, returnable May 20, 1952. Hearing was had on May 20, 1952, upon the petition, respondent's return to the petition and petitioner's traverse to the return. Upon conclusion of the hearing, the Court orally announced its decision denying the petition without prejudice. No written order was filed.

On July 31, 1952, petitioner orally moved for reconsideration. After hearing both sides, the court concludes that the petitioner's detention is lawful and that no grounds for rehearing exist.¹

¹Petitioner cites the cases of Ng Lin Chong and Wong Lai King v. McGrath, Court of Appeals D.C. #11183 and #11217, decided July 3, 1952, not yet reported. These cases, in my opinion, are not here apropos, and, in any event, I do not believe they should be followed.

Wherefore it is Ordered that the petition for writ of habeas corpus be and the same is hereby denied.

Dated: August 1, 1952.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed August 1, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court and to Defendant and to Chauncey Tramutolo and Edgar R. Bonsall, His Attorneys.

Take notice that the petitioner in the above-entitled cause hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the Honorable Louis E. Goodman, United States District Judge in the Southern Division of the United States District Court for the Northern District of California denying the petition for a writ of habeas corpus, said order dated August 1, 1952.

Dated this 4th day of August, 1952.

/s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed August 7, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled matter, and that they constitute the record on appeal as designated by the attorneys for the appellant herein:

Petition for writ of habeas corpus.

Order to show cause.

Return to order to show cause.

Traverse to the return to order to show cause.

Order denying petition for writ of habeas corpus.

Notice of appeal.

Statement of points on which appellant intends to rely on appeal.

Order extending time to docket record on appeal.

Designation of contents of record on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 30th day of September, 1952.

[Seal]

C. W. CALBREATH,

Clerk,

By /s/ C. M. TAYLOR,

Deputy Clerk.

[Endorsed]: No. 13560. United States Court of Appeals for the Ninth Circuit. Fong Hung, Appellant, vs. Bruce G. Barber, as the District Director of the Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 30, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13560

FONG HUNG,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration
and Naturalization Service,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY IN THE
APPEAL OF THE ABOVE-ENTITLED
MATTER

Comes Now, Fong Hung, by and through his at-
torney, Joseph S. Hertogs, files herein the State-
ment of Points on which appellant intends to rely
in the appeal of the above-entitled matter:

I.

That the District Court erred in holding that the
appellant was given a fair hearing as required by
the "due process of law" clause of the Fifth
Amendment to the Constitution of the United
States.

II.

The District Court erred in holding and deciding
that Section 156, Title 8, United States Code An-
notated, as amended by the Act of September 23,
1950, was not applicable (Act of Feb. 5, 1917, 39
Stat. 887; 64 Stat. 1010).

III.

The District Court erred in holding and deciding that the appellee complied with Section 156, Title 8, United States Code Annotated, as amended by the Act of September 23, 1950 (Act of Feb. 5, 1917, 39 Stat. 887; 64 Stat. 1010).

IV.

The District Court erred in holding that the petitioner was not entitled to the benefit of Section 724(a) of Title 8, United States Code Annotated.

V.

That the District Court erred in holding and deciding that the petitioner was lawfully restrained of his liberty by the appellee under a valid warrant of deportation.

Dated: October 4, 1952.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellant.

[Endorsed]: Filed October 3, 1952.

[Title of District Court and Cause.]

STIPULATION AND ORDER

It is hereby stipulated by and between counsel for appellant and counsel for appellee that the exhibits, consisting of Immigration and Naturalization Service files, which were attached to and made a part of the Return to Order to Show Cause may be considered in their original form without printing.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellant.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

By /s/ EDGAR R. BONSALE,
Asst. United States Attorney.

/s/ ALBERT LEE STEVENS,

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed October 7, 1952.

